No. 06-384

In the Supreme Court of the United States

JAVIER OTONIEL BUSTAMANTE-BARRERA,
PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1432(a) (1994), a child born abroad to alien parents became a citizen of the United States, upon satisfaction of a residency requirement, if both parents were naturalized as United States citizens while the child was under the age of 18. Section 1432(a) also provided, however, for various exceptions to the requirement that both parents be naturalized, including the situation in which the parents were legally separated and the parent having legal custody was naturalized. The question presented is:

Whether petitioner's mother had sole "legal custody" of petitioner as a child under 8 U.S.C. 1432(a)(3) (1994), where petitioner's divorced parents had joint legal custody pursuant to a 1991 divorce decree, but petitioner's mother obtained an amended divorce decree, after petitioner became an adult and was in removal proceedings, that awarded her sole legal custody of petitioner retroactive to the date of the original divorce decree.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 447 F.3d 388. The order (Pet. App. 29a) and decision (Pet. App. 36a-41a) of the immigration judge and the decisions of the Board of Immigration Appeals (Board) (Pet. App. 27a-28a, 30a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2006 (Pet. App. 1a). A petition for rehearing was denied on June 20, 2006 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on September 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I of the Constitution assigns to Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute.

The statute at issue here, 8 U.S.C. 1432(a) (1994), provided that children who were born outside of the United States, and whose parents both were aliens, became citizens of the United States upon naturalization of their parents, if certain requirements were satisfied. Under that statute, the child acquired citizenship as a result of (1) the naturalization of both parents before the child's eighteenth birthday, and (2) the child's lawful residence in the United States while the child was under age 18. See 8 U.S.C. 1432(a)(1), (4) and (5) (1994). Under limited circumstances, however, the first requirement could be satisfied through the naturalization of only one parent. If one parent was deceased, naturalization of the surviving parent while the child was under age 18 satisfied the parental naturalization requirement. 8 U.S.C. 1432(a)(2) (1994). Likewise, if the child's parents were legally separated, naturalization of the parent having legal custody of the child sufficed. 8 U.S.C. 1432(a)(3) (1994).[1] And, if the child was born out of wedlock and paternity had not been established by legitimation, naturalization of the mother before the child reached age 18 met the parental naturalization requirement.[2] *Ibid.*

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[1] Petitioner's derivative citizenship claim is under Section 1432(a)(3).

[2] Section 1432(a) was repealed effective February 27, 2001, by the Child Citizenship Act of 2000 (CCA), Pub.L. No. 106-395, § 103(a), 114 Stat. 1632. The CCA applies only to aliens who were under the age of

2. Petitioner was born in Mexico in 1979 to Mexican nationals. Pet. App. 2a. He was admitted to the United States, along with his parents, in 1983 as a lawful permanent resident. *Ibid.* In 1991, petitioner's parents divorced in California. *Id.* at 2a, 44a-50a. Their divorce decree awarded his mother "sole *physical* custody" of petitioner, but awarded both his parents "joint *legal* custody." *Id.* at 2a, 49a. After his parents' divorce, petitioner "resided exclusively with his mother." *Id.* at 2a. Under the terms of his parents' joint legal custody, however, petitioner's father retained visitation rights. *Id.* at 3a, 49a. On February 28, 1994, while petitioner was still under the age of 18, his mother became a naturalized citizen of the United States. *Id.* at 3a, 32a. His father never naturalized. *Id.* at 2a.

In 2000, petitioner was convicted in Texas of assault causing bodily injury to a family member. Pet. App. 3a. In 2002, petitioner was convicted in Texas of aggravated assault with a deadly weapon and assault resulting in bodily injury. *Ibid.* For his 2002 convictions, petitioner was sentenced to a ten-year term of imprisonment. *Ibid.*

3. In August 2002, the Department of Homeland Security (DHS) initiated removal proceedings based on (1) petitioner's convictions for two crimes involving moral turpitude; and (2) petitioner's conviction for an aggravated felony. Pet. App. 3a; see 8 U.S.C. 1227(a)(2)(A)(ii), (iii) and (E)(i).

Before the immigration judge, petitioner admitted his convictions but contended that he was not subject to removal because he had automatically derived United States citizenship under Section 1432(a) based upon his

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18 on the effective date; petitioner does not meet that condition. His derivative citizenship claim is therefore governed by 8 U.S.C. 1432(a) (1994).

mother's naturalization in 1994. Pet. App. 3a-4a. He contended that he satisfied Section 1432(a)'s requirements because, at the time of his mother's naturalization, he was under the age of 18, under her legal custody, and residing in the United States as a lawful permanent resident. *Id.* at 4a. Petitioner conceded that, in the event his citizenship claim failed, he was removable as charged. *Id.* at 32a.

4. On November 15, 2002, after he was placed in removal proceedings, and when he was already 23 years old, his mother sought to change petitioner's legal custody status retroactively. Pet. App. 4a, 51a-62a. Specifically, at his mother's request, and without any objection from petitioner's father, a California court issued a *nunc pro tunc* amended divorce decree (amended decree) "which purported to award petitioner's mother *sole* legal custody retroactively effective to February 4, 1991." *Id.* at 4a, 58a. In support of the amended decree, petitioner's mother filed a declaration stating that "'[t]he purpose' for seeking the order was 'to satisfy requirements of the Department of Immigration and Naturalization'" regarding petitioner. *Id.* at 4a.

5. After considering the amended decree, the immigration judge concluded that petitioner met the requirements for derivative citizenship under Section 1432(a) and terminated the removal proceedings. Pet. App. 5a.

6. DHS appealed the immigration judge's decision to the Board. Pet. App. 5a. On October 3, 2003, the Board sustained DHS's appeal. *Id.* at 30a-35a. The Board observed that "[i]t is undisputed that [petitioner] cannot be found to have derived citizenship from his mother without the November 15, 2002, *nunc pro tunc* amended divorce decree." *Id.* at 33a. The Board refused to give effect to the amended decree. It pointed

out that the amended decree was not issued "to have an immediate effect upon the custody of [petitioner], since he was an adult who had not been subject to any legal custody requirements of either parent for 4 years." *Id.* at 34a. Rather, the Board explained, petitioner's mother sought the amended decree solely to prevent petitioner from being "removed from the United States to Mexico" by rendering him eligible "to claim derivative citizenship." *Ibid.* The Board concluded that to honor the amended decree in these circumstances would be "contrary to public policy and decades of Supreme Court jurisprudence requiring strict compliance with the statutory requirements to obtain United States citizenship," and would "defeat[] the purpose of the Congressionally enacted naturalization requirements." *Ibid.* The Board accordingly sustained DHS's appeal and remanded the case to the immigration judge, who ordered petitioner removed from the United States. *Id.* at 35a.

7. After the immigration judge entered a removal order on remand, petitioner appealed that order to the Board, arguing that by ignoring the amended decree, the Board overstepped its legal authority; violated the Full Faith and Credit Act, 28 U.S.C. 1378; and violated the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 6a. In March 2005, the Board rejected each of these arguments based on the reasoning of its October 2003 decision. *Id.* at 27a-28a.

8. The court of appeals denied petitioner's petition for review. Pet. App. 1a-26a. The court first addressed petitioner's claim, raised for the first time in that court, that Section 1432(a)(3) did not require petitioner's mother to have *sole* legal custody, and that joint custody therefore sufficed. *Id.* at 12a. Upon reviewing the text,

structure, and purpose of the statute, the court held that only sole legal custody satisfies Section 1432(a)(3). *Id.* at 13a-19a. The court of appeals then turned to the question whether petitioner, prior to his eighteenth birthday, was in the sole legal custody of his mother notwithstanding the 1991 divorce decree that awarded his parents "*joint* legal custody." *Id.* at 19a. The court first rejected petitioner's contention that the court could disregard the 1991 decree because he was, for purposes of federal immigration law, effectively in the sole legal custody of his mother prior to his eighteenth birthday. *Ibid.* While the court concluded that, under *Nehme* v. *INS*, 252 F.3d 415 (5th Cir. 2001), one State's law may not control the "legal custody" determination, the court pointed out that petitioner had "offered * * * *no* evidence" that he had "effectively been in the sole legal custody of his mother." Pet. App. 21a.

The court next rejected petitioner's contention that the Full Faith and Credit Act required the court to apply the amended decree to his naturalization claim. Pet. App. 22a. The court explained that the amended decree "does not even implicate the Full Faith and Credit Act" because petitioner's custodial status for purposes of federal immigration law "is determined by federal law." *Ibid.* The court recognized that petitioner's "custody status under state law might provide evidence of his such status for federal naturalization purposes," *ibid.*, but concluded that the court was not "*bound* by California's determination" in deciding petitioner's custodial status under the statute. *Ibid.*

The court observed that the First Circuit's decision in *Fierro* v. *Reno*, 217 F.3d 1 (2000), supported its refusal to accord effect to the amended decree. *Fierro* involved "strikingly similar" facts (Pet. App. 24a) be-

cause there, as here, an adult alien sought to avoid deportation by having his parents obtain a *nunc pro tunc* state court order retroactively altering the legal custody arrangement that existed when he was a child. *Id.* at 23a. The First Circuit refused to permit the *nunc pro tunc* order to establish "legal custody" within the meaning of Section 1432(a)(3), explaining that giving effect to the order "would open the floodgates for abuse, 'allowing] . . . state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness.'" *Id.* at 24a (quoting *Fierro*, 217 F.3d at 6).

The court of appeals "decline[d] to credit" the amended decree because it "agree[d] with the First Circuit that relying on such a *nunc pro tunc* order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law." Pet. App. 24a. The court qualified its holding by noting that the decision did not "foreclos[e]" the possibility that in different circumstances a "*nunc pro tunc* amended decree could enhance an alien's claim of derivative citizenship," *ibid.*, such as where, unlike here, the alien child "had in fact been in the sole legal custody of his one naturalized parent," and the amended decree was entered to recognize that reality. *Ibid.*

Finally, the court rejected petitioner's argument that the court's failure to recognize his derivative citizenship claim would violate the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 25a-26a. The court observed that petitioner was not similarly situated to "an alien child whose parents' original separation decree placed the child in the sole legal custody of his one naturalized parent," because petitioner as a child was *not* in his mother's sole legal cus-

tody. *Id.* at 25a. The court concluded that there was nothing irrational in treating petitioner differently from alien children who became citizens by virtue of having been in the sole legal custody of their naturalized parent, because "the amended decree was brazenly obtained for the sole purpose of manipulating federal immigration law and had no legitimate state purpose whatsoever." *Id.* at 26a.

ARGUMENT

Petitioner contends (Pet. 16-22) that the court of appeals erred in applying federal law to determine the effect of the amended divorce decree on his legal custody status and further contends (Pet. 6-12) that the decision conflicts with the decisions of other circuits. Those contentions lack merit. The court of appeals' decision is correct and does not conflict with the decision of any other circuit. In fact, the First Circuit is the only other court of appeals that has squarely addressed the question presented, and it resolved that question in the same manner as the decision below. No further review is warranted.

1. The court of appeals correctly held that it was not bound by the state court's amended divorce decree for purposes of determining petitioner's legal custody status under former 8 U.S.C. 1432(a)(3) (1994). See Pet. App. 22a-23a. Petitioner does not dispute (Pet. 17) that the meaning of the term "legal custody" is a question of federal law. The Board and court of appeals are not required by federal law to recognize a state court order when doing so would defeat the purpose of the federal statute in which the term appears. Recognizing the amended decree here would do precisely that. As the First Circuit has explained, "both the language of the automatic citizenship provision and its apparent under-

lying rationale suggest that Congress was concerned with the legal status of the child *at the time* that the parent was naturalized and during the minority of the child." *Fierro*, 217 F.3d at 6. The court elaborated that "Congress clearly intended that the child's citizenship should follow that of the parent who *then* had legal custody," because "Congress wanted the child to be protected against separation from the parent having legal custody during the child's minority." *Ibid.* (emphasis added). Recognizing a state court order that altered the legal custody arrangement the alien had as a child after the alien became an adult—solely for the purpose of preventing the alien from being deported—"would hardly * * * serve[]" Congress's purpose and "would in substance allow the state court to create loopholes in the immigration laws." *Ibid.* Accord Pet. App. 25a (refusing to reward "such blatant manipulation of federal law").

Petitioner insists (Pet. 16-22) that state law should be controlling, but he points to no case law or other source of authority that supports his proposed approach in these unusual circumstances.[3] In fact, the law appears to be uniformly against him. See, *e.g.*, *Minasyan* v. *Gonzales*, 401 F.3d 1069, 1080 n.20 (9th Cir. 2005)

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[3] Petitioner contends that "[t]he government has argued that the relevant state's domestic relations law—not federal law—should determine whether a parent is legally separated under § 1432(a)." Pet. 19 (citing Brief of the Attorney General, *Nehme* v. *Reno*, No. 00-60111, 2000 WL 33981409, at *13-*14 (5th Cir. filed June 26, 2000)). The government's defense of the Board's application of state law to decide the "legal separation" issue in that case is not inconsistent with the government's position in this case that the Board was correct in refusing to give effect to the amended legal custody decree. *Nehme* did not present the abuse-of-process concerns that justify applying a federal rule here to prevent manipulation of the immigration laws and frustration of Congress's intent.

(citing *Fierro* approvingly for the proposition that "[r]etroactively changing the legal relationship would create a legal fiction and would not serve the purpose of the [derivative citizenship] statute"); *Miller* v. *Christopher*, 96 F.3d 1467, 1473 (D.C. Cir. 1996) ("To allow [the alien] to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation."), aff'd, 523 U.S. 420 (1998); cf. *De Sylva* v. *Ballentine*, 351 U.S. 570, 580-581 (1956) (observing that while it is proper in interpreting a federal statute "to draw on the ready-made body of state law to define" a word implicating family relationships, "[t]his does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage").[4]

The court of appeals' refusal to give effect to the legal fiction that the amended decree purported to establish provides no basis to conclude that the court would have refused to give effect to a state court order in different circumstances, where the order awarded legal custody of the alien child to one parent at the time the

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[4] Petitioner does not address whether applying state law as the rule of decision in this case would produce a different outcome. Because there is no support for the proposition that state law should dictate the legal force to be accorded a state court order obtained and issued for the sole purpose of affecting the implementation of federal law in immigration proceedings, the court of appeals' decision does not merit this Court's review regardless of whether the outcome would be different under state law. Nevertheless, it bears noting that the Supreme Court of California has held that "a nunc pro tunc order cannot declare that something was done which was not done." *Johnson & Johnson* v. *Superior Ct.*, 695 P.2d 1058, 1066 (1985) (citation omitted).

alien was a child. The court of appeals observed that an alien's "custody status under state law might provide evidence of his such status for federal naturalization purposes." Pet. App. 22a. And the court went so far as to suggest that even a *nunc pro tunc* state court decree could be given effect in a case in which that decree "legitimately demonstrate[d] that an alien child had in fact been in the sole legal custody of his one naturalized parent prior to his eighteenth birthday." *Id.* at 24a. The court thus correctly recognized that state law has a role to play in informing the meaning of terms in federal immigration laws, such as "legal custody," that deal with domestic relations, while ensuring at the same time that state law is not used to manipulate the outcome of federal proceedings.

2. Only two other circuits have addressed the meaning of the term "legal custody" in Section 1432(a)(3), and neither one presents a conflict with the decision below. Petitioner cites (Pet. 8) *Fierro*, but his derivative citizenship claim would fail under that decision for the same reason it failed here. In that case, the alien's mother was awarded legal custody of Fierro in 1973 and never became a naturalized citizen. 217 F.3d at 3. In 1978, when Fierro was 15 years old, his father became a naturalized citizen. *Id.* at 2. Fierro submitted an amended custody judgment dated May 18, 1998, and secured four months after the immigration judge's removal order. *Id.* at 3. The decree awarded custody to Fierro's father "nunc pro tunc to September 1, 1977." *Ibid.* (citation omitted). The complaint for modification explained that "[t]his modification is necessary for [Fierro] to derive citizenship through his father and avoid being deported to Cuba." *Id.* at 4 (citation omitted; first set of brackets in original). The First Circuit rejected the assertion

that a *nunc pro tunc* amended custody decree obtained for the express purpose of affecting the outcome of federal immigration proceedings satisfied Section 1432(a)(3)'s "legal custody" requirement. *Fierro*, 217 F.3d at 6. In an opinion authored by Judge Boudin, the First Circuit reasoned, as the court of appeals did here, that reliance on such an order as the basis for derivative citizenship would open the floodgates for abuse, "allow[ing] * * * state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness." *Ibid.* Because petitioner's citizenship claim fails under *Fierro* for the same reason it failed in the court of appeals, any possible differences in the approaches that the First Circuit and Fifth Circuit have applied to the term "legal custody" do not merit review in this case.

The only other decision to address the meaning of "legal custody" is *Bagot* v. *Ashcroft*, 398 F.3d 252 (3d Cir. 2005). But that case did not even present the question of what effect should be given under Section 1432(a) to a state court order, retroactive or otherwise, awarding legal custody of an alien child to only one parent. Instead, *Bagot* presented the question of how to determine which parent had legal custody *in the absence* of a "judicial or statutory grant of custody." *Id.* at 259.

Bagot followed the approach that the Board of Immigration Appeals adopted in *In re M-*, 3 I. & N. Dec. 850 (BIA 1950), to defining "legal custody" under a predecessor statute. *Bagot*, 398 F.3d at 259-260. There, the Board determined that if there is a "judicial determination or judicial or statutory grant of custody," then the parent to whom custody has been granted has legal custody for immigration purposes. *In re M-*, 3 I. & N. Dec. at 856. And if no such determination or grant exists,

then the parent in "actual uncontested custody" is deemed to have legal custody. *Ibid.* In *Bagot*, no legal custody determination under a divorce or custody decree existed; accordingly, the court resolved the issue on the "actual uncontested custody" prong of *In re M-*, and concluded that Bagot had been in his father's actual uncontested custody and therefore derived United States citizenship based upon his father's naturalization. Because *Bagot* does not suggest, much less hold, that it would give effect to the type of *nunc pro tunc* decree issued in this case, *Bagot* provides no basis for further review here.

3. Petitioner asserts (Pet. 9-10) that the court of appeals' decision conflicts with *Wedderburn* v. *INS*, 215 F.3d 795 (7th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *Minasyan*, *supra*; and *Morgan* v. *Attorney General*, 432 F.3d 226 (3d Cir. 2005). Petitioner is incorrect. There is no conflict with those cases because they dealt with a separate and distinct statutory issue, namely the meaning of the term "legal separation" in Section 1432(a)(3).[5] The terms "legal custody" and "legal separation" are distinct concepts. In fact, the court of appeals here expressly noted that the decisions addressing "legal separation" informed its analysis, but did not "control[] it." Pet. App. 13a n.30; see *Bagot*, 398 F.3d at 267 ("[T]he two concepts are easily distinguishable."). Thus, the decision below is not a suitable vehicle for addressing the different approaches that petitioner alleges

[5] It is undisputed that petitioner's parents divorced in 1991 and that the divorce satisfied the "legal separation" requirement for purposes of Section 1432(a)(3).

the courts of appeals have taken in determining whether the "legal separation" requirement has been satisfied.[6]

4. Review clearly is unwarranted for all of the reasons discussed above. An additional reason to deny review is that Section 1432(a) was repealed effective February 27, 2001. Therefore, the pool of aliens who can potentially seek derivative citizenship under Section 1432(a) will be steadily diminishing. Far from supporting petitioner's request for review by this Court, that repeal lessens the prospective significance of petitioner's challenge and further confirms that certiorari is not warranted.[7]

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[6] None of the decisions that petitioner characterizes as applying state law (Pet. 9-10) holds or implies that effect would be given to *nunc pro tunc* state court orders with respect to legal separation that alter retroactively the legal arrangements that existed at the time the alien was a child for the sole purpose of influencing the outcome of an immigration proceeding. As mentioned in the text, pp. 9-10, *supra*, at least one of those courts has indicated precisely the opposite. See *Minaysan*, 401 F.3d at 1080 n.20. Conversely, the only two circuits that petitioner argues (Pet. 7-8) have applied federal common law to "legal separation" determinations, *i.e.*, *Nehme* v. *INS*, 252 F.3d 415 (5th Cir. 2001), and *Brissett* v. *Ashcroft*, 363 F.3d 130 (2d Cir. 2004), have looked to state law to inform their decisions. See *Nehme*, 252 F.3d at 426 ("[O]ur formulation of a federal standard by which to interpret the term 'legal separation' may also be informed by state law, particularly in this case, where there is no ready-made, federal body of law on domestic relations."); *Brissett*, 363 F.3d at 135 n.5 ("Where * * * an alien asserts that a particular form of legal process obtained through a state or nation's legal system satisfies the content of the federal standard we have established, we must first look to state or foreign law to determine how the legal process on which the alien relies affected the spouses' rights and relationship.")

[7] Contrary to petitioner's contention (Pet. 13-16), this case is not a proper vehicle to address how the term "legal custody" as used in the CCA (§ 103, 114 Stat. 1631) will be interpreted. The court of appeals did not interpret that statute, and no circuit has yet addressed that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2007

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issue. Moreover, the CCA replaced the term "legal custody" in former Section 1432(a)(3) with the new and different term "legal and physical custody."